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IN THE

Supreme Court of the United States

October Term, 1962.

No. 818

UNIVERSAL FILM EXCHANGES, INC.,
ALLIED ARTISTS DISTRIBUTING CORP.,
RKO GENERAL, INC.,
PARAMOUNT FILM DISTRIBUTING CORP.,
TWENTIETH CENTURY-FOX FILM CORP.,
UNITED ARTISTS CORPORATION,
COLUMBIA PICTURES CORP.,
LOEW'S INCORPORATED,

Petitioners,

v.

BOARD OF FINANCE AND REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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LOEW'S INCORPORATED,
Petitioners,

v.

BOARD OF FINANCE AND REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

This is a petition by eight motion picture distributors for a writ of certiorari to review a judgment of the Supreme Court of Pennsylvania which affirmed orders of the Board of Finance and Revenue of the Commonwealth of Pennsylvania.

OPINION BELOW.

The Board of Finance and Revenue entered brief orders as of October 3, 1961 (R. 22a, 44a, 64a, 85a, 107a, 126a, 146a, 166a), but did not write any opinions. The opinion and order of the Supreme Court of Pennsylvania is set forth in Appendix A and is reported at 409 Pa. 180, 185 A. 2d 542.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on November 13, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(3).

QUESTION PRESENTED.

Where a state statute requires the payment of license fees, enforced by summary sanctions without appeal, as a condition precedent to doing business and the statute is thereafter held unconstitutional, may a state supreme court nullify the constitutional obligation of the state to refund such license fees

(a) by viewing the payments as having been made voluntarily as a matter of law

(b) by suggesting that those subjected to the payment of license fees had failed to use remedies, which were, in reality, either non-existent or totally inadequate, and

(c) by refusing to give retroactive effect to the invalidation of the statute?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The pertinent provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States are:

> "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *."

2. The pertinent provisions of the Pennsylvania Fiscal Code (Act of April 9, 1929, P. L. 343, 72 P. S. § 503), with relevant amendments, are set forth in Appendix B.

STATEMENT.

Petitioners, major distributors of motion pictures in Pennsylvania and elsewhere, continuously paid license fees to the Pennsylvania State Board of Censors as compelled by the Motion Picture Censorship Act from its effective date in 1915 until 1956 (R. 268a) when the Supreme Court of Pennsylvania held that act violative of the First and Fourteenth Amendments to the Constitution of the United States. **Hallmark Productions, Inc. v. Carroll**, 384 Pa. 348.

Following this decision, refunds were sought under Section 503(a) of the Pennsylvania Fiscal Code, Appendix B, *infra*, p. 35, which requires that "* * * any petition for the refund of * * * license fees * * * paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled * * *" shall be directed to the Board of Finance and Revenue. The Board of Finance and Revenue granted refunds of license fees paid within five years of the filing of refund petitions but denied refunds of payments made more than five years prior to the filing of the petitions, on the ground that, under Section 503(a)(4), a five year limitation was imposed on the refund of license fees paid under an act subsequently held to be unconstitutional. Appendix B, *infra*, p. 36.[1]

The petitions for refund involved in this case averred that license fees had been paid to the Pennsylvania State Board of Censors during the period 1915-1953 under duress and compulsion because the unconstitutional Motion Picture Censorship Act of 1915

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1. An initial test, by distributors other than those here involved, of the five year limitation was disposed of on a pleading point, namely, that the petitions for refund there involved failed to allege payment under duress or compulsion. **Screen Guild Productions of Philadelphia v. Board of Finance and Revenue**, 73 Pa. Dauphin Co. Rep. 315 (1959); *affirmed*. **Box Office Pictures, Inc. v. Board of Finance and Revenue**, 402 Pa. 511, 166 A. 2d 656 (1961).

"(a) required the payment of license fees in advance to secure the approval of films by the Pennsylvania State Board of Censors, thereby making such payment an absolute condition precedent to distributing or exhibiting films in the Commonwealth;

"(b) provided for the immediate seizure of films which had not been approved by the Pennsylvania State Board of Censors;

"(c) provided for the arrest and summary conviction of persons distributing and exhibiting unapproved films;

"(d) provided for the arrest and summary conviction of the persons hindering or interfering with the seizure of any unapproved films.

"(e) provided for no appeal procedure or court review prior to the payment of the required license fees and formal disapproval of films by the Board."

Petitioners then averred:

"* * * **that the refund of license fees paid to the Commonwealth under duress and compulsion of an unconstitutional State statute is required by the 14th Amendment to the Constitution of the United States;**[2] and that the purported five-year limitation on refunds contained in Section 503(a)(4) of the Pennsylvania Fiscal Code is unconstitutional if applied to bar refunds of these license fees paid for many years under duress and compulsion of this unconstitutional statute and constitutes a taking of those monies by the Commonwealth without due process of law in violation of the 14th Amendment to the Constitution of the United States."[3]

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2. Wherever bold face appears in this Petition the emphasis is ours.

3. R. 17a-19a, 39a-41a, 59a-61a, 80a-82a, 102a-104a, 121a-123a, 141a-143a 161a-163a.

No answers were filed to these petitions. After a hearing on September 26, 1961, at which no testimony was taken, the Board of Finance and Revenue entered orders which simply denied the petitions (R. 22a, 44a, 64a, 85a, 107a, 126a, 146a, 166a).

Petitioners then took appeals from these orders to the Supreme Court of Pennsylvania, bringing before that Court the constitutional questions raised in their refund petitions (See, *e.g.*, R. 173a, 175a, 183a, 185a).

The court below first disposed of motions to quash the appeals, filed by the Commonwealth, which urged, *inter alia*, that no appeal would lie to review the action of the Board in refusing a petition for refund (Par. 1(c) Commonwealth's Motions to Quash). The court below held that review is available where, as here, a constitutional question was raised. Appendix A, *infra*, p. 24. Turning to the merits, the court below affirmed the Board's orders.

REASONS FOR GRANTING THE WRIT.

The basic proposition urged by petitioners below was that, where license fees have been paid under duress and compulsion and the statute under which the fees were exacted is subsequently declared unconstitutional, the Fourteenth Amendment compels the refund of the fees so exacted. **Ward v. Commissioners of Love County**, 253 U. S. 17 (1920); **Carpenter v. Shaw**, 280 U. S. 363 (1930); **Swift Co. v. United States**, 111 U. S. 22 (1884). Petitioners pointed out that payment of license fees under the Motion Picture Censorship Act of 1915 was an absolute condition precedent to doing business and that failure to comply with the requirements of that Act, including the payment of license fees, exposed petitioners to fine, imprisonment and confiscation of their films, with no right of appeal. Petitioners further pointed out that, during the entire period for which refunds were sought, the constitutionality of motion picture censorship had been established under the decision of the Supreme Court of Pennsylvania in **Buffalo Branch, Mutual**

Film Corp. v. Breitinger, 250 Pa. 225, 95 Atl. 433 (1915). See, also, **Vitagraph Inc.'s Application**, 295 Pa. 471, 145 Atl. 525 (1929); **In Re The Ramparts We Watch**, 39 Pa. D. & C. 437 (1940). Re-examination of the constitutionality of motion picture censorship legislation in Pennsylvania was only undertaken by the Supreme Court of Pennsylvania after this Court's decisions in **Burstyn, Inc. v. Wilson**, 343 U. S. 495 (1952), and subsequent cases. Thereafter, the Motion Picture Censorship Act was declared unconstitutional and void. **Hallmark Productions, Inc. v. Carroll**, 384 Pa. 348, 121 A. 2d 584 (1956).[4]

The court below accepted the basic proposition urged by petitioners, agreeing that "* * * no statutory authority * * *" was needed to enable those paying license fees under compulsion to recover the amounts upon a subsequent declaration of unconstitutionality of the statute under which payments were made; that this right was guaranteed by the **Fourteenth Amendment**. App. A, *infra*, p. 25.[5] The court below also recognized that the question whether the license fees in this case had been paid under duress and compulsion was one of law since the relevant facts were not in dispute. App. A, *infra*, p. 26. After noting that the "* * * decisions

4. The majority opinion in **Hallmark**, as well as the concurring opinion of the present Chief Justice, made plain that the declaration of unconstitutionality declared in that case was made "reluctantly" and viewed as compelled by this Court's decision in **Burstyn**.

5. In accepting this basic proposition, the court below took a position contrary to that taken by the Board of Finance and Revenue. As already noted, that Board had denied the petitions in one line orders. However, in its motions to quash, the Commonwealth asserted that the five year limitation in Section 503(a)(4) of the Fiscal Code limited the amount of refund, apparently without regard to the question whether the payments had been made voluntarily or under duress. It should be noted that the Attorney General of Pennsylvania or his designee sits as a member on the Board of Finance and Revenue and thereafter represents the Board in court proceedings. 71 Purdons' Penna. Stat. § 115. Here, the same attorney who represented the Commonwealth in the court below sat as a member of the Board at the hearing on these petitions.

of the Supreme Court of the United States did not clearly delineate or define what constitutes a payment under duress and compulsion * * *, the court held that the license fee payments here had not been made "* * * under legal duress * * *." App. A, *infra*, pp. 27-28.

In reaching this conclusion, the court first noted that the fact that a statute imposed a tax, and provided for execution to enforce the tax, did not in and of itself constitute legal duress. The court went on to point out, relying on general principles in tax cases, that a taxpayer can make payment under protest, give notice of intention to sue and thereafter bring suit for the recovery of the allegedly wrongful exaction. Absent protest, the remedy provided cannot be invoked. The court apparently conceded that the exaction of money under a statute which provided no remedy or other means of immediate relief would be distinguishable from the ordinary tax situation.[6] App. A, *infra*, pp. 28-29. However, this case was viewed below as being governed by the rule applied in ordinary tax cases. In other words, the court held that petitioners had failed to protest and thereafter to invoke remedies which were said to be adequate and available. For this reason, the court below characterized petitioners' payment of license fees as having been made voluntarily.

As an alternative holding, the court below suggested that no retroactive effect need be given to its declaration of unconstitutionality of the censorship legislation in the **Hallmark** case on the ground that the license fees had been necessary to defray the cost of the services rendered to petitioners under the Act. These services, said by the court below to have been of "real and substantial benefit" to peti-

6. It is not clear whether the court below also intended to hold that the constitutional right to recover payments exacted under compulsion could be lost by failure to sue "within a reasonable time". Appendix A, *infra*, p. 30. The court cited **Wilson v. School District of Philadelphia**, 328 Pa. 225, 195 A. 90 (1937), in which payment of the disputed taxes was held to be voluntary. And, see, **Royal McBee Corp. Tax Case**, 393 Pa. 477, 143 A. 2d 393 (1958).

tioners, consisted of censoring films. App. A, *infra*, p. 31.

The result below nullifies petitioners' constitutional right to recover moneys paid under duress and compulsion of an unconstitutional statute. Petitioners submit that this result was reached by a refusal to recognize the actual situation presented and to apply the controlling principles applicable in that situation. Thus, license fees paid by petitioners under the Motion Picture Censorship Act of 1915 were clearly paid under compulsion and duress. Such fees were exacted as a condition precedent to doing business and failure to pay the fees would have exposed the petitioners to summary penalties without appeal. No adequate remedy was available to petitioners. Finally, the requirement that films be censored before being shown, cannot, we submit, be classified as a valuable service provided to petitioners by the State, with the result that no refund is owed.

A. Petitioners' Paid License Fees Under Duress and Compulsion.

In **Swift Co. v. United States**, 111 U. S. 22 (1884), this Court held that long continued conformity by a business to a governmental requirement imposed under color of law was not a voluntary act where such conformity was critical to the continuation of the business. There, a match manufacturer had acquiesced for many years in a practice of the Commissioner of Revenue whereby the manufacturer received its discount, in connection with the purchase of necessary revenue stamps, in stamps rather than at a higher cash rate. After the Court struck down the statutory interpretation on which the Commissioner's practice was based, **Swift Co. v. United States**, 105 U. S. 691 (1881), the manufacturer brought suit to recover the discount calculated under the cash method. This Court rejected the Commissioner's argument that any recovery was precluded because of the manufacturer's "voluntary" conformity over the years. The Court noted that the manufacturer "• • • could not continue business without stamps, and it could not purchase stamps except upon the terms prescribed by

the Commissioner of Internal Revenue. * * *" 111 U. S. at pp. 28-29. As to whether the manufacturer's conduct was voluntary, the Court said (111 U. S. at p. 28):

> "We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria.*"

Again, in **Union Pacific Railroad Co. v. Public Service Commission**, 248 U. S. 67 (1918), this Court rejected a contention that payment under a Missouri statute, for a certificate authorizing a bond issue, was voluntary. Mr. Justice Holmes, for the Court, stated (248 U. S. at p. 70):

> "On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The Railroad Company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the Company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. * * *"

Under the principle of these and similar cases,[7] it is clear that petitioners' payment of license fees under the

7. **Gaar, Scott & Co. v. Shannon**, 223 U. S. 468 (1912); **Atchison, T. & S. F. Rwy. v. O'Connor**, 223 U. S. 280 (1912); **Stahmann v. Vidal**, 305 U. S. 61 (1938); **Robertson v. Frank Bros. Co.**, 132 U. S. 17 (1889).

Censorship Act must be viewed as payment under duress. Section 17 of the Motion Picture Censorship Act of 1915 required the payment of license fees "in advance" to secure the approval of films by the Board of Censors.[8] The Act provided for the immediate seizure of films which had not been approved by the Board of Censors;[9] and for the arrest and summary conviction of those distributing and exhibiting such films;[10] and those hindering or interfering with the seizure of any unappproved film.[11]

The payment of license fees under Section 17 of the 1915 Act was an absolute condition precedent to Board examination for approval or disapproval. Thus, there was an absolute obligation to pay the Section 17 fee as a condition to doing business at all. The act provided no appeal procedure or court review with respect to the payment of the required license fees. On the contrary, the only appeal or court review provision contained in the 1915 Act was applicable only after payment of the license fee, and dealt only with a situation in which a particular motion picture had been disapproved by the Board because, in the Board's judgment, it was indecent and immoral.[12]

In these circumstances, petitioners, in paying the compelled license fees, were in no sense acting voluntarily. Rather, they were meeting an official requirement in order to remain in business. This involved choice but the choice was "* * * the lesser of two evils * * *." **Union Pacific Railroad Co. v. Public Service Comm.**, *supra*, at p. 70. As prudent business men, they were not obliged to make that choice which exposed them to the threatened penalties. *Id.*, **Robertson v. Frank Bros. Co.**, 132 U. S. at p. 23.

Plainly, then, petitioners' payment of license fees must be viewed as having been made under the compulsion and duress of an unconstitutional statute. From this flows the

8. Section 17 of the Act (4 P. S. § 46).
9. Section 20 of the Act (4 P. S. § 48).
10. Sections 27 and 28 of the Act (4 P. S. § 55 and § 56).
11. Section 25 of the Act (4 P. S. § 53).
12. Section 26 of the Act (4 P. S. § 54).

state's constitutional obligation to make refunds. To avoid this constitutional obligation, the court below here refused to recognize the true nature of the payments.[13] Instead, it resorted to the device of characterizing them as "voluntary", a device which this Court has already condemned in **Union Pacific Railroad Co. v. Public Service Commission,** *supra*. There, Mr. Justice Holmes said (248 U. S. at p. 69):

> "The Supreme Court of the State avoided [the constitutional question] by holding that the application to the Commission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. *Creswill v. Knights of Pythias*, 225 U. S. 246. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U. S. 280."

B. Petitioners Had No Adequate Remedies or Other Means of Immediate Relief.

1. As pointed out by this Court in **State Tonnage Tax Cases**, 12 Wall. 204, 209 (1870), a state can provide an exclusive remedy for recovering moneys paid under duress and compulsion. But this remedy must be fair and ade-

13. Elsewhere, the court below has recognized that payments made under comparable circumstances "* * * can be considered voluntary only in the most labored sense of the word. * * *" **Glendale Heights Ownership Ass'n v. Glenolden Borough School District**, 393 Pa. 485, 491, 143 A. 2d 386 (1958).

quate or it deprives the payor of the procedural due process guaranteed by the Fourteenth Amendment. See **Anniston Mfg. Co. v. Davis**, 301 U. S. 337, 343 (1937); **Burrill v. Locomobile Co.**, 258 U. S. 34, 38-39 (1922); **Security National Bank of Watertown v. Young**, 55 F. 2d 616 (8th Cir. 1932), *cert. denied*, 286 U. S. 551 (1932).

Here, far from having access to a fair and adequate remedy, petitioners were effectively denied any real opportunity to assert their rights. This can be readily demonstrated by an examination of the remedies to which the court below pointed as theoretically available to petitioners during the period covered by these refund petitions.

(a) The court below suggested that petitioners could have brought a "timely action * * * to test the constitutionality of the Act." App. A, *infra*, p. 30. A "timely action" could, in theory, have been instituted but it would not have been possible to obtain a court decision holding the 1915 Censorship Act unconstitutional until, at the very earliest, sometime after 1952.

As we have shown, the constitutionality of the censorship legislation was upheld in the **Buffalo Branch** case in 1915, as legislation within the state's police power. 250 Pa. 225, 95 Atl. 433 (1915).[14] Any attempt to attack the constitutionality of the legislation prior to 1952 would have been summarily dismissed. See, *e.g.*, **Vitagraph Inc.'s Application**, 295 Pa. 471, 145 Atl. 518 (1929); **In Re The Ramparts We Watch**, 39 Pa. D. & C. 437 (1940). Any such action brought during this period would not only have been futile but would have served to estop those bringing the action from thereafter attacking the constitutionality of the legislation. See, *e.g.*, **Philadelphia v. Ridge Avenue Ry. Co.**, 142 Pa. 484 (1891); **Strauss v. W. H. Strauss & Co.**, 328 Pa. 72 (1937); and **City Deposit Bk. and Tr. Co. v.**

14. The statute before the Supreme Court in the **Buffalo Branch** case was the 1911 censorship legislation which was supplanted by the 1915 Act. The 1915 Act was, in all material aspects, the same legislation.

Zoppa, 336 Pa. 379 (1939). Only after this Court brought motion pictures within the free speech guarantees of the First Amendment in 1952 were state courts willing to undertake a re-examination of earlier decisions which had sustained the validity of motion picture censorship laws. Only then, for the first time, was an opportunity presented to obtain a determination that the 1915 Act was unconstitutional. In **Hallmark**, 384 Pa. 348, 121 A. 2d 584 (1956), the Supreme Court of Pennsylvania did examine the 1915 Act and found that it violated the federal constitution on the basis of the same attack which had been made and rejected in the **Buffalo Branch** case, *supra*.

(b) The Supreme Court of Pennsylvania said that petitioners "had the right to file petitions for refunds within two years or within five years of payment, under Section 503(a) and 503(a)(4) of the Fiscal Code, *supra*, and therein raise the question of their right of recovery, as well as the constitutionality of the Censorship Act." App. A, *infra*, p. 30. The lack of substance in this suggestion demonstrates, perhaps, the extremes to which the court below went in holding against petitoners. During the period covered by these refund petitions, the very terms of Section 503 of the Fiscal Code did not even permit the filing of refund petitions with the Board of Finance and Revenue until a court had declared the 1915 Act unconstitutional.

From the effective date of Section 503(a)(4) in 1929 until its amendment in 1943 there was no right to file a refund petition with the Board of Finance and Revenue for recovery of payments made under a statute until the Supreme Court of Pennsylvania had determined the unconstitutionality of such statute. Appendix B, *infra*, p. 35. Between 1943 and 1952, there was no right to file a refund petition with the Board "until a final judgment of a court of competent jurisdiction" declared such statute unconstitutional.[15] Appendix B, *infra*, p. 36.

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15. In **FDIC v. Board of Finance and Revenue**, 368 Pa. 463, 469, 471, 84 A. 2d 495 (1951), the Supreme Court of Pennsyl-

(c) The court below stated generally that petitioners "had the right to appeal from the decision of the Board of Censors to the Court of Common Pleas." App. A, *infra*, p. 30. The appeal procedure in the 1915 Act to which the court referred afforded petitioners no remedy whatever. No appeal was permitted at the time of imposition of the license fee. A highly limited form of appeal could be taken only from the Board of Censors' disapproval of a particular motion picture. Section 26 of the 1915 Act, 4 P. S. § 54.

Thus, appeal procedure was only available to question the judgment of the Board of Censors that a particular motion picture was "sacrilegious, obscene, indecent or immoral" or "tended to debase or corrupt morals." Petitioners are reputable motion picture distributors and the fact is that, during all the years that their pictures were subjected to censorship, none of their pictures were disapproved by the Board of Censors. Accordingly, even the highly limited appeal procedure contained in the Act was not available to petitioners.[16]

(d) The Supreme Court of Pennsylvania suggested that the petitioners could have attacked the constitutionality of the Censorship Act by appealing any summary conviction imposed upon them for violation of the Act. Appendix A, *infra*, p. 30. But such a course of conduct would have required petitioners deliverately to violate the Act; thereby subjecting themselves to summary enforcement procedures whereby their films would be confiscated and their business

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vania specifically held that there was no authority for the filing of "cautionary" petitions for refund with the Board of Finance and Revenue setting forth the claimants' contentions as to unconstitutionality. The Court stated that the petitioner must be "able to present, not merely an argument, but an actual decision of a court of competent jurisdiction," before his petition could even be filed with the Board of Finance and Revenue.

16. In **Hallmark**, the case in which the censorship legislation was re-examined and held unconstitutional, the proceeding had begun with the disapproval by the Board of Censors of a picture proposed for exhibition by Hallmark Productions.

irreparably damaged; and all this when there was not the remotest chance of prevailing on the constitutional question.

2. Hence, during the years covered by their refund petitions, petitioners were without any adequate remedy for the recovery of license fees. Under the only procedure permitted by the state for seeking refunds, Section 503(a) of the Fiscal Code, petitioners could not even apply to the Board of Finance and Revenue until there had been a court determination of the unconstitutionality of the Censorship Act of 1915. During the same period, a determination of the unconstitutionality of this Act could not have been obtained in the Pennsylvania courts. It is noteworthy, in this connection, that the court below, in suggesting remedies available to petitioners, never adverted to the controlling authority of its **Buffalo Branch** decision and to its reluctant departure from that decision in the **Hallmark** case.

The attempt of the court below to dispose of this case by pointing to illusory remedies brings that court's action within the condemnation of this Court's decision in **Brinkerhoff-Faris Co. v. Hill**, 281 U. S. 673 (1930). There, Mr. Justice Brandeis, speaking for the Court said (281 U. S. at pp. 681-682):

> "* * * But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. * * *"

C. The Rule of Retroactive Invalidity Applies in This Case.

The general rule of retroactive invalidity is that a statute adjudged to be unconstitutional "* * * is not a law; it confers no rights, it imposes no duties, it is, in legal contemplation as inoperative as though it had never passed."

Norton v. Shelby County, 118 U. S. 425, 442 (1886). Accord, **Chicago I. & L. Rwy. v. Hackett**, 228 U. S. 559, 566 (1913). This Court has suggested that there may be certain exceptions to this general rule. Thus, contractual and other rights clearly vested prior to a determination of statutory invalidity have been left undisturbed where such rights vested pursuant to an earlier court decision to which the person subsequently asserting the invalidity had been a party. **Chicot County Drainage Dist. v. Baxter State Bank**, 308 U. S. 371 (1940). Absent such considerations which give rise, at least, to collateral estoppel, the rule of retroactive invalidity applies.

To avoid holding that, after **Hallmark**, the 1915 Censorship Act was "* * * as inoperative as though it had never passed * * *", the court below sought to equate this case to a situation in which intervening vested rights have been left undisturbed. Referring to its earlier opinion in **Box Office Pictures, Inc. v. Board of Finance and Revenue**, 402 Pa. 511 166 A. 2d 656 (1961), in which general reference was made to **Chicot County**, the court below insisted that the license fees imposed on petitioners had been necessary to defray the cost of "* * * the services rendered * * *" to those subjected to the 1915 Censorship Act; and that, as had been stated in the **Box Office** case, the fees were a "* * * *quid pro quo* for the inspection services rendered by the Censorship Board * * *." App. A, *infra*, p. 31.

What the court below seems to be saying is this: The Board of Censors existed, under the 1915 Act. Petitioners were compelled to submit their motion pictures to the Board for approval and to pay license fees. The approval and licenses were only necessary because of the statute and its sanctions. The statute has been voided but it will now be assumed that, without regard to the statute, a valuable service was at all times being rendered to petitioners for which they paid appropriate consideration, measured by the license fees. In other words, the court below tries to create

retroactively a completed contractual arrangement between petitioners and the Board which will now be left undisturbed.[17]

There is absolutely no merit to this argument. Petitioners paid license fees, as they were compelled to do, in order to stay in business. No other arrangement can now be foisted on them. And no service, valuable or otherwise, was performed by the Board for petitioners.[18]

The attempt to use the "quid pro quo" as a device for qualifying the case as an exception to the general rule of retroactive invalidity underscores the fact that such exceptions cannot be invoked to protect a governmental unit from the constitutional obligation to refund monies exacted under duress and compulsion of an unconstitutional statute. Indeed, to recognize the constitutional obligation to refund is at the same time to recognize that the general rule of retroactive invalidity must likewise be applied. Otherwise the constitutional obligation to refund could never exist; and no one could ever recover license fees exacted under duress and compulsion of a statute later declared unconstitutional, because the governmental agency which had exacted the fees would always come into court and say that the statute involved was constitutional at the time the license fees were exacted.

The only approach consistent with fair recognition by a state of its constitutional obligation to make refunds upon a declaration of unconstitutionality of a statute under

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17. If there were any validity to this notion that petitioners paid license fees to defray the costs of services rendered, there would have been no basis for refund at all. Nevertheless, refunds were made under Section 503(a) of the Fiscal Code which authorizes the return of money to which the Commonwealth is not "rightfully or equitably entitled * * *."

18. As already noted, petitioners are reputable distributors and no film of theirs was ever disapproved. Further it should be noted that there is no basis in the record or in fact for the inference below that license fee payments were passed on to the public.

which the payments were compelled is embodied in **People Ex Rel. Rice v. Graves**, 242 App. Div. 128, 273 N. Y. Supp. 582 (1934), *affirmed per curiam*, 270 N. Y. 498, 200 N. E. 288 (1936), *cert. denied*, 298 U. S. 683 (1936). In this case the New York State Tax Commission, in deference to a 1928 ruling by this Court, did not tax income derived from copyright royalties. In 1932 the United States Supreme Court reversed its earlier ruling and sustained the taxation of such royalties. After the 1932 decision, the New York State Tax Commission made a retrospective assessment of additional tax for the years 1929, 1930 and 1931. This retrospective assessment was sustained. The Court first discussed the effect of an overruling decision and concluded that, in the absence of the creation of intervening property rights, such decisions are fully retrospective in operation. The Court next considered the contention that a retrospective decision worked a hardship on a taxpayer and said (273 N. Y. S. at p. 591):

> "We have not overlooked the relator's contention that a retrospective application of the decision in the Fox Film Case works an apparent hardship as to him. We concede as much. The answer to that argument, however, is that the hardship in question is no greater on the relator than was that suffered by the state by the erroneous decision in Long v. Rockwood. The ruling in that case deprived the state of revenue to which it was justly entitled. The construction in the instant case involves no hardship upon the relator beyond the payment of those taxes which he would have been required to pay in any event had the discredited decision in Long v. Rockwood never been made."

If an overruling decision validating a payment to a state should be given retrospective effect to permit collection of the payments for periods prior to the decision, as in the **Graves** case, it follows that an overruling decision

invalidating the payment should also be given retrospective effect to permit recovery of payments for periods prior to that decision.

CONCLUSION.

If the decision of the Supreme Court of Pennsylvania in this case is permitted to stand, a severe blow will be dealt to the constitutional right to recover license fees exacted under duress and compulsion of a state statute subsequently declared unconstitutional. Under existing decisions of this Court, the right of recovery is recognized but the remedy is entrusted to the state forum. But, in the state forum, under the view adopted by the Supreme Court of Pennsylvania, this right of recovery can be nullified by a mere asserting that the payor received a "*quid pro quo*" for services rendered under a statute which was subsequently invalidated but which had not been declared unconstitutional at the time the so-called services were rendered.

Even more importantly, the admonition of Mr. Justice Holmes in **Union Pacific Railroad Co. v. Public Service Commission**, *supra*, comes into sharp focus. There he warned (248 U. S. at pp. 69-70) that this Court should intervene; otherwise it would become entirely possible for a state to impose an unconstitutional burden upon its taxpayers "by the threat of penalties worse than it in case of a failure to accept it", and then—since conduct under duress always involved a choice—to avoid the consequences of its action by declaring the acceptance "voluntary". Certainly no state may enact statutes of dubious constitutionality which impose heavy burdens on segments of the business community, safe in the assurance that it can obtain immunity from all subsequent consequences by the device of holding compliance "voluntary".

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

Nos. 18-25 May Term, 1962

UNIVERSAL FILM EXCHANGES, INC.,
Appellant in No. 18,

ALLIED ARTISTS DISTRIBUTING CORP.,
Appellant in No. 19,

RKO GENERAL, INC.,
Appellant in No. 20,

PARAMOUNT FILM DISTRIBUTING CORP.,
Appellant in No. 21,

TWENTIETH CENTURY-FOX FILM CORP.,
Appellant in No. 22,

UNITED ARTISTS CORPORATION,
Appellant in No. 23,

COLUMBIA PICTURES CORP.,
Appellant in No. 24,

LOEW'S INCORPORATED,
Appellant in No. 25,

v.

BOARD OF FINANCE AND REVENUE.

APPEALS FROM ORDERS OF THE BOARD OF FINANCE AND REVENUE, DOCKET NUMBERS M-16585, M-16586, M-16587, M-16589, M-16590, M-16591, M-16592, M-16593.

OPINION OF THE COURT

BELL, *C. J.* Filed: November 13, 1962

These eight appeals seek review of Orders of the Board of Finance and Revenue denying refunds of motion picture censor *license fees* paid by them between 1915 and 1953. Appellee moved to quash and this motion was orally argued together with the appeals on the merits.

The present appellants have for many years been major distributors of motion pictures in the Commonwealth of Pennsylvania and elsewhere. Appellants continuously paid to the Pennsylvania State Board of Censors annual license fees of $2.00 for each film, under the Motion Picture Censorship Act from its effective date in 1915 until March, 1956, when—as required by *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495—that Act was declared unconstitutional by this Court in *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (1956).

The First Amended Petitions for refund were presented to the Board of Finance and Revenue at a hearing on July 2, 1959. These petitions covered only the amount of license fees paid *within five years* from the date of the filing of Appellants' original refund petitions, to wit, $337,436.25. The Board on July 8, 1959, ordered refunds, in the nature of credits, to each of these eight appellants in the exact amounts claimed.

Appellants, four and one-half months after this Court's decision in *Box Office Pictures v. Board of Finance and Revenue*, 402 Pa. 511, 166 A. 2d 656, filed with the Board the (present) Second Amended Petitions for refund of *license fees* which were paid by them *more than five years* prior to the filing of appellants' original refund petitions. These claims totaled $4,637,258.14 and upwards for the period between 1915 and 1953. In these present amended petitions, appellants averred *for the first time* that the license fees were paid *"under duress and compulsion"*.

This averment was obviously made in an attempt to bring their claims within certain language of this Court contained in the *Box Office Pictures* case, supra. No answers were filed by the Board to appellants' present petitions. A hearing was held by the Board on these petitions on September 26, 1961, but no testimony was taken. On October 9, 1961, the Board entered the following Orders (as of October 3, 1961):

"After full consideration the Prayer of this Petition is refused." The present appeals were taken from these Orders.

Section 503(e) of the Fiscal Code of April 9, 1929, P. L. 343, as amended, 72 PS § 503(e) provides: "The action of the Board on all petitions filed under this section shall be final." These appeals are therefore in the nature of narrow certiorari.

> "If an appeal is prohibited by an Act, or the decision of the Agency is stated to be final or conclusive, the law is well settled that an appeal will lie to the Courts in the nature of a narrow certiorari and this Court will review only (1) the question of jurisdiction; (2) the regularity of the proceedings before the Agency; (3) questions of excess in exercise of powers; and (4) constitutional questions: Cf. DeVito v. Civil Service Commission, 404 Pa. 354, 172 A. 2d 161 (and cases cited therein); Dauphin Deposit Trust Company v. Myers, 401 Pa. 230, 164 A. 2d 86:" *Keystone Raceway Corp. v. State Harness Racing Commission*, 405 Pa. 1, 173 A. 2d 97.

Appellants contend that the five-year Statute of Limitations in Section 503(a)(4)* of the Fiscal Code of 1929, supra, is unconstitutional when applied to bar recovery of

* Petitioners' claims for refunds were filed, apparently inadvertently, under § 503(a) which has a two-year statute of limitations. They argue that if the five-year statute of limitations in § 503(a)(4) is unconstitutional, *a fortiori*, the two-year statute of limitations is unconstitutional.

license fees exacted by the Commonwealth for many years under the duress and compulsion of an unconstitutional act, viz. the Motion Picture Censorship Act. They thus raise a constitutional question and consequently appellee's motion to quash the appeal is denied.

Appellants, motion picture distributors, were required by the Motion Picture Censorship Act of May 15, 1915, P. L. 534, as amended by the Act of May 8, 1929, P. L. 1655, 4 PS § 41 et seq., to remit to the State Board of Censors a fee of two dollars "for the examination of each film, reel or set of views of one thousand two hundred lineal feet or less," and two dollars for each duplicate or print thereof. The present actions were brought under Section 503(a), although more properly under Section 503(a)(4), of the Fiscal Code, supra, which pertinently provides:

> "Section 503. Refunds of State Taxes, License Fees, Et Cetera.—The Board of Finance and Revenue shall have the power, and its duty shall be, (a) To hear and determine any petition for the refund of . . . license fees . . . paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled . . . . All such petitions for refund must be filed with the board within two years of the payment of which refund is requested, or within two years of the settlement in the case of taxes or bonus, whichever period last expires, except . . (4) When any tax or other money has been paid to the Commonwealth, under a provision of an act of Assembly, subsequently held by final judgment of a court of competent jurisdiction to be *unconstitutional* *. . . . In such case, the petition to the board may be filed either prior or subsequent to such final judgment, but must be filed *within five years of the payment* of which a refund is requested . . . ."

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* Italics throughout, ours.

Appellants contend, we repeat, that the five year limitation violates the 14th Amendment of the United States Constitution if applied to bar recovery of license fees *exacted under duress and compulsion* of the unconstitutional Motion Picture Censorship Act of 1915, supra.

If payment of taxes is voluntary, even though the taxing statute is later held unconstitutional, the money paid cannot be recovered in the absence of statutory authorization: *Royal McBee Corp. Tax Case*, 393 Pa. 477, 143 A. 2d 393 (1958); *Chesebrough v. United States*, 192 U. S. 253; *Ward v. Love County*, 253 U. S. 17, 22 (1920); *Swift Company v. United States*, 111 U. S. 24.

In *Royal McBee Corp. Tax Case*, 393 Pa., supra, the Court said (p. 480):

> "At common law a voluntary payment of taxes, erroneously made, could not in the absence of a statute, be recovered: Calvert Distillers Corp. v. Board of Finance & Revenue, 376 Pa. 476, 479, 103 A. 2d 668 (1954); Girard Trust Co. v. Philadelphia, 359 Pa. 319, 325, 59 A. 2d 124 (1948); Hotel Casey Co. v. Ross, 343 Pa. 573, as A. 2d 737 (1942); Arrott v. Allegheny County, 328 Pa. 293, 194 A. 910 (1937)."

It follows that since a State need not allow recovery of taxes or other moneys *voluntarily but erroneously paid*, it can impose reasonable restrictions on any recovery it does allow: *Box Office Pictures v. Board of Finance & Revenue*, 402 Pa., supra; *Swift Company v. United States*, 111 U. S. 24, 31.

However, where *taxes or other moneys* were paid under duress and compulsion, no statutory authority is required or necessary to enable the payors to recover the amounts paid, because a denial of recovery in such a situation would violate the 14th Amendment to the United States Constitution: *Ward v. Love County*, 253 U. S., supra; *Carpenter v. Shaw*, 280 U. S. 363, 369; *Swift Company v. United States*, 111 U. S., supra; *Glendale Heights*

Ownership Association v. Glenolden Borough School District, 393 Pa. 485, 491-492, 143 A. 2d 386.

Since appellants cannot bring themselves within the recovery provisions of the Fiscal Code, supra, they have the burden of proving that the payments were made under duress and compulsion: *Mahnomen County v. United States*, 319 U. S. 474, 477 (1943).

Whether duress and compulsion exist is a question that must be determined in the light of the facts and circumstances of each case, and where, as here, the relevant facts are not in dispute the question is one of law for the court to decide. *Eslow v. Albron*, 153 Mich. 720, 117 N. W. 328. Cf. *Kaplan v. Kaplan*, 404 Pa. 147, 171 A. 2d 166; *Kalyvas v. Kalyvas*, 371 Pa. 371, 89 A. 2d 819; *Johnson, Admr. v. Angretti*, 364 Pa. 602, 73 A. 2d 666.

We turn then to a consideration and determination of the relevant facts in the case at bar and what facts amount in law to payments made under duress and compulsion.

The Amended Second Amended Petition of each appellant avers:

> "6. Petitioner avers that the aforesaid fees were paid under duress and compulsion because the unconstitutional Motion Picture Censorship Act of 1915
>
> "(a) required the payment of license fees in advance to secure the approval of films by the Pennsylvania State Board of Censors, thereby making such payment an absolute condition precedent to distributing or exhibiting films in the Commonwealth;
>
> "(b) provided for the immediate seizure of films which had not been approved by the Pennsylvania State Board of Censors;
>
> "(c) provided for the arrest and summary conviction of persons distributing and exhibiting unapproved films;

"(d) provided for the arrest and summary conviction of the persons hindering or interfering with the seizure of any unapproved films;

"(e) provided no appeal procedure or court review *prior* to the payment of the required license fees and formal disapproval of films by the Board."

Appellants contend that since its averments of duress and compulsion were not denied by the Commonwealth, it is well settled both by the decisional law and the rules of civil procedure that they are deemed to be admitted. This rule, however, does not apply to the present appeals for two reasons. First, the Board of Finance and Revenue is not a Court but an administrative tribunal which handles over 40,000 petitions for refunds per year. Viewed realistically, it is apparent that the Board cannot answer each and every one of these petitions. Secondly, and more important, the rule upon which appellants rely is inapplicable because appellants have pleaded (a) legal conclusions, and (b) facts which, as we shall see, are not sufficient to constitute duress. Cf. *Bogash v. Elkins*, 405 Pa. 437, 176 A. 2d 677. In that case the Court said (page 439):

"Preliminary objections admit all facts which are well pleaded, but not the pleader's conclusions or averments of law: Ross v. Metropolitan Life Insurance Co., 403 Pa. 135, 169 A. 2d 74; Gardner v. Allegheny County, 382 Pa. 88, 114 A. 2d 491; Narehood v. Pearson, 374 Pa. 299, 96 A. 2d 895."

It will be noted that the duress and compulsion averred by appellants consists (most importantly) of (1) mandatory payment of license fees in advance of distributing or exhibiting, and (2) the seizure of films if they had not been approved, and (3) the arrest and summary conviction for distributing and exhibiting unapproved films. While the decisions of the Supreme Court of the United States do not

clearly delineate or define what constitutes a payment under duress and compulsion and it is very difficult to reconcile the language in some cases with the language in others, we are convinced that the license-fee payments made by these appellants were not made under legal duress.

"Neither a statute imposing a tax, *nor the execution thereunder* nor a mere demand for payment, is treated as duress:" *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 471 (1912). However indicative of the fact that the line of demarcation between a voluntary payment and a payment under duress is not absolutely clear, the Court went on to say, at page 471-472:

> ". . . It does not necessarily follow that there will be a levy on goods. Or, if there is, the citizen, to avoid the consequences of the levy, may pay the money, regain the use of his property and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. But he has the same right to sue if he pays under compulsion of a statute, whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date a penalty of twenty-five per cent shall be incurred, the license of the company shall be cancelled, *and the right to sue shall be lost*, operates much more as duress, than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back. Swift Co. v. United States, 111 U. S. 22, 29; Robertson v. Frank Brothers Co., 132 U. S. 17, 23; Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 329; Atchison, Topeka & Santa Fe R. R. v. O'Connor, decided this day, ante, p. 280. *Otherwise plaintiff might be without any remedy whatever.* For in Arkansas Building & Loan Asso. v. Madden, 175 U. S. 269, it was held that a taxpayer was not entitled to an injunction, against the enforcement of a similar statute

of the State of Texas, unless he could show that there was no adequate remedy at law. And, as payment under such an act was treated as compulsory, for which suit might be maintained, and as there was nothing to indicate inability of complainant to pay, or of the defendant to respond to a judgment, the bill was dismissed without prejudice. That necessarily recognized that the plaintiff had the right to pay under protest, sue the officer for the amount exacted and recover it back in case it should be made to appear that the statute was void."

In *Cheschrough v. U. S.*, 192 U. S. 253, the United States Supreme Court said (p. 259):

"The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment is made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment. Little v. Bowers, 134 U. S. 547; Railroad Company v. Commissioners, 98 U. S. 541, 544; Radich v. Hutchins, 95 U. S. 210, . . ."

Moreover, there is no violation of due process, because the present appellants could have paid the fees under protest and with notice of an intent to reclaim and recover the amounts paid, and brought a timely suit in assumpsit, or

under certain circumstances a bill in equity to restrain the collection of the tax, where there is no power to levy the tax to recover the amount paid: *Glendale Heights Ownership Association v. Glenolden Borough School District*, 393 Pa. 485, 143 A. 2d 386; *Narehood v. Pearson* (and cases cited therein), 374 Pa. 299, 306, 96 A. 2d 895; *English v. Robinson Township School District*, 358 Pa. 45, 55, 55 A. 2d 803; *Jamison Coal & Coke Co. v. Unity Township School District*, 362 Pa. 389, 392, 66 A. 2d 759; *Commonwealth v. Dauphin County, et al.*, 354 Pa. 556, 563, 47 A. 2d 807.

These appellants, we repeat, paid the license fees for the entire thirty-nine year period, made no protests as to the payments, and brought no timely action to recover the money or to test the Constitutionality of the Act. Many remedies were available to appellants, but they took advantage of none. For example, they had the right to appeal from the decision of the Board of Censors to the Court of Common Pleas of the proper County under Section 26 of the Act of May 15, 1915, P. L. 534, 4 PS § 54. This was the very procedure used in *Hallmark Productions, Inc. v. Carroll*, 384 Pa., supra, page 350, to determine the constitutionality of the Motion Picture Censorship Act of 1915. Appellants also had the right to file petitions for refunds within two years or within five years of payment, under Section 503(a) and 503(a)(4) of the Fiscal Code, supra, and therein raise the question of their right of recovery as well as the Constitutionality of the Censorship Act. The appellants would also have the right to appeal from any summary conviction.

Even if this licensing provision were a tax, instead of a license fee, we said in the *English* case, supra, page 55: "... it has long been settled in this Commonwealth that a plaintiff may go into equity to restrain attempted taxation for want of a power to tax. ..."

Furthermore, in this class of case, Pennsylvania applies the doctrine of equitable estoppel. In *Wilson v. School District of Philadelphia*, 328 Pa. 225, 195 A. 90, the Court said (page 246):

"Once a taxpayer has omitted to voice his objection *within a reasonable time* after the levy has been made and with knowledge that his claim will be made the basis of expenditures to be incurred, and the expenditures have been made, it is too late for him to attempt to impeach the validity of the tax levy."

Appellants' payments were for license fees, not taxes. We have heretofore treated these appeals as if the license fees were the equivalent of taxes although in this case they were not. Appellants admit that the Motion Picture Censorship Act was not a taxing measure. The license fees imposed thereunder were necessary in order to defray the cost or expense of the services rendered to appellants and others under the Act. As this Court said in *Box Office Pictures v. Board of Revenue & Finance*, 402 Pa., supra, (pages 518-519):

"Under the Act of 1915, the fees in question were paid without protest as a quid pro quo for the inspection services rendered by the Censorship Board. From these services real and substantial benefits enured to these appellants and others engaged in the business of distributing motion picture film. There was a benefit without resulting loss to those now complaining in as much as the cost incident to these services was, undoubtedly, cast upon the theatre-going public. During these long ensuing years, despite adequate opportunity to take legal action to challenge the validity of the Censorship Act, acquiescence, inaction and payment without protest continued until 1956. Viewed in all of these aspects, we cannot now conclude that the administrative actions of the Censorship Board should be viewed as if they never had been.

". . . The Commonwealth, under the fiscal code previously alluded to, in effect, permits itself to be sued for fees paid under a statute subsequently declared to be unconstitutional. Through the Legislature, it di-

rects that such claims for refund be made to the Board of Finance and Revenue. But, as is its right, it affixes thereto the requirements that the petition for refunds must be filed within five years of the payment or settlement of the money for which the refund requested is made. This is a reasonable condition precedent to the right itself. The remedy is not available on any terms but may be asserted only under the conditions which the Legislature saw fit to prescribe: Land Holding Corp. v. Board of F. & Rev., 388 Pa. 61, 130 A. 2d 700 (1957). These conditions failed of observance in this case. Appellants' failure to protest or to file timely action contesting the validity of the Act of 1915, followed by opportune requests for refunds, is of their own making. Adequate legal remedies were available. They saw fit to ignore them."

Furthermore, even when taxes were paid under duress and compulsion, the taxpayer could not recover them beyond six years after payment: *Swift Company v. United States*, 111 U. S., supra.

All of the decisions of the United States Supreme Court which are relied upon by appellants to prove duress and compulsion are distinguishable.

Few taxes or license fees would ever be collected if sanctions or penalties were not provided or imposed for non-payment and consequently most taxing and licensing acts have sanctions or penalties to enforce payment. To hold that such provisions amount in law to duress and compulsion would be to hold that all taxes and license fees in *all* such cases were paid under duress and compulsion. We find no merit legally or even equitably in appellants' contentions.

We hold (1) that the license fees paid by these appellants were not paid under duress or compulsion, and (2) that the five-year statutory period for the recovery of moneys voluntarily but mistakenly paid to the Commonwealth, as required by a licensing Act which was subse-

quently declared to be unconstitutional, was reasonable and violated none of appellants' constitutional rights.

Orders affirmed.

Mr. Justice Cohen files a concurring opinion.

CONCURRING OPINION.

COHEN, *J.* Filed: November 13, 1962.

Article I, section 11 of the Constitution provides "suits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the Legislature may by law direct."

The legislature provided for the refund of state tax and license fees by the Board of Finance and Revenue (Board) under certain conditions in section 503 of the Fiscal Code of April 9, 1929, P. L. 343, as amended, 72 P. S. § 503. Section 503 further provides that when a tax or other money has been paid to the Commonwealth under a provision of an Act of Assembly, subsequently held by a court of competent jurisdiction to be unconstitutional, the petition to the Board shall be filed within five years of the payment for which the refund is requested. Justice Eagen said in *Box Office Pictures, Inc. v. Board of Finance and Revenue*, 402 Pa. 511, 166 A. 2d 656 (1961), ". . . these requirements were not merely procedural provisions, but express conditions of the right to obtain a refund. . . ."

Since appellants' petition for a refund was not filed within five years of the time when the license fees were paid, they have failed to meet the fundamental conditions for relief. Any relief beyond the five-year-period would be in direct contravention to Article I, section 11 of our Constitution.

Appellants rely heavily upon *Carpenter v. Shaw*, 280 U. S. 363 (1930) and *Ward v. Love County*, 253 U. S. 17 (1920). Both cases deal with facts vastly dissimilar and do

not consider the problem of sovereign immunity of states from suit nor the validity of statutory time limitations prescribed for such suits. There is no precedent for this action. An appeal does not lie from the refusal of the Board to pass upon appellants' petition which seeks to require the Board to violate the very terms of the statute by which it was created and exceed the powers that the legislature had granted.

I would terminate this litigation by granting the motion to quash.

APPENDIX B.

Pertinent Provisions of Section 503 of the Pennsylvania Fiscal Code (72 P. S. § 503(a)).

1. Section 503 provides in pertinent part:

"Section 503. Refunds of State Taxes, License Fees, Et Cetera.—The Board of Finance and Revenue shall have the power, and its duty shall be,

"(a) To hear and determine any petition for the refund of * * * license fees * * * paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled and, upon the allowance of any such petition, to refund such * * * license fees * * *"

"All such petitions must be filed with the board within two years of which refund is requested * * * except * * *"

2. As originally enacted, the subsection dealing with petitions for refund after a declaration of unconstitutionality read as follows (Act of April 9, 1929, P. L. 343, art. V § 503):

"(c) When any tax or other money has been paid to the Commonwealth, under a provision of an act of Assembly subsequently held by the court of final jurisdiction to be unconstitutional, or under an interpretation of such provision subsequently held by such court to be erroneous. In such case, the petition to the board shall be filed within five years of the payment of which a refund is requested."

3. The subsection dealing with petitions for refund after a declaration of unconstitutionality was amended in 1943 to read as follows (Act of May 7, 1943, P. L. 229, § 1):

> § 503(a)(4) "When any tax or other money has been paid to the Commonwealth, under a provision of an act of Assembly subsequently held by final judgment of a court of competent jurisdiction to be unconstitutional, * * *. In such case, the petition to the board shall be filed within five years of the payment of which a refund is requested, * * *."

4. In 1952, this subsection was further amended to read as follows (Act of Jan. 19, 1952, P. L. 2178 § 1):

> § 503(a)(4) "* * * In such case, the petition to the board may be filed either prior or subsequent to such final judgment but must be filed within five years of the payment of which a refund is requested, * * *. The board shall have jurisdiction to hear and determine any petition for refund filed prior to such final judgment only if, at the time of the filing thereof, proceedings are pending in a court of competent jurisdiction wherein the claims of unconstitutionality or erroneous interpretation made in the petition for refund may be established, and in such case the board shall not act upon the petition for refund until the final judgment determining the question or questions involved in such petition has been handed down. * * *"

Office-Supreme Court, U.S.
FILED
MAR 15 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962
No. 818

UNIVERSAL FILM EXCHANGES, INC.
ALLIED ARTISTS DISTRIBUTING CORP.
RKO GENERAL, INC.
PARAMOUNT FILM DISTRIBUTING CORP.
TWENTIETH CENTURY-FOX FILM CORP.
UNITED ARTISTS CORPORATION
COLUMBIA PICTURES CORP.
LOEW'S, INCORPORATED,
Petitioners

v.

BOARD OF FINANCE AND REVENUE

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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JURISDICTION

The jurisdiction of the Board of Finance and Revenue on refund petitions is "final". The action of the Board was reviewed by the Supreme Court of Pennsylvania on narrow certiorari. Review by this Court, if permitted, should also be limited to narrow certiorari.

QUESTION PRESENTED

Where the State Constitution permits only the Legislature to modify the State's sovereign immunity from suit, and where the Legislature, in authorizing refunds of taxes or license fees by the Board designated for this purpose, imposes a five-year limitation upon such refunds, is the five-year limitation constitutional?

STATEMENT OF THE CASE

The petitioners here are in effect attempting to sue the Commonwealth of Pennsylvania for $4,637,258.14 "and upwards" for license fees allegedly paid by petitioners to the State Board of Motion Picture Censors during the 39-year period from 1915 to 1953, inclusive. These petitioners had already received refunds of $337,436.25 for license fees paid during the 5-year period prior to 1958.

The petitioners filed petitions for refund before the Pennsylvania Board of Finance and Revenue, which refused the petitions because, inter alia, the refunds were claimed for payments made beyond the 5-year statutory period of limitations. Since the action of the Board of Finance and Revenue was "final", there was no statutory provision for appeal or writ of error. However, the Pennsylvania Supreme Court assumed jurisdiction to review these petitions by narrow certiorari because the appellants had raised a constitutional question, i.e., that the 5-year statute of limitations violated due process.

The Pennsylvania Supreme Court, in upholding the orders of the Board of Finance and Revenue, decided that the payments had not been paid under compulsion or duress, and that the 5-year period of limitations was valid.

Article I, Section 11 of the Pennsylvania Constitution provides that "suits may be brought against the

Commonwealth in such manner, in such courts, and in such cases as the Legislature may by law direct". The Pennsylvania Supreme Court has held that "An action against the Board of Finance and Revenue is an action against the State": *Land Holding Corp. v. Board of Finance and Revenue*, 388 Pa. 61, 65, 130 A. 2d 700 (1957).

The refund provisions of The Fiscal Code required that petitions for refund of taxes or license fees paid under a statute later held to be unconstitutional must be filed within 5 years of payment thereof. This provision has been construed as "not merely procedural", but "express conditions of the right to obtain a refund": *Box Office Pictures, Inc. v. Board of Finance and Revenue*, 402 Pa. 511, 516, 518, 166 A. 2d 656 (1961), in which the appellants were also contending that similar license fees had been paid under compulsion or duress, and for that reason the 5-year limitation, being in violation of due process, would not apply.

The petitions for certiorari should be denied by this Court because: (1) the license fees in question were not paid under duress or compulsion, and the 5-year limitation is valid; (2) even if the license fees had been paid under duress or compulsion, the petitioners could not have recovered them because of (a) the six-year common law limitation pronounced by the court below, (b) the laches and delay of the petitioners, and (c) the unavailability of the Board of Finance and Revenue, with its jurisdiction limited to claims filed within 5 years of payment, to hear any petitions such as the instant ones beyond its statutory powers.

The payment of license fees by the petitioners during the period from 1915 to 1953 were not made under duress or compulsion, either in fact or in law. During that period, the censorship statute was deemed to be constitutional, because it had been in effect so held both by this Court and by the Supreme Court of Pennsylvania. For purposes of determining duress, the statute must have been constitutional during that period; otherwise, the alleged duress would necessarily have to be attributed solely to the earlier decision of this Court.

Moreover, during the entire 39-year period, petitioners made no protests as to payments, and took no procedural steps or remedies to have their rights adjudicated. In filing the initial petitions for refunds, petitioners waited more than six years after the decision of this Court reversing its former position, and 2½ years after the similar decision of the Supreme Court of Pennsylvania. The petitions said nothing about duress and compulsion, and not until 4 months after the decision of the Pennsylvania Supreme Court in the *Box Office Pictures* case were the Amended Second Amended Petitions filed alleging duress. This was more than 9 years after the decision of this Court holding such a statute unconstitutional. Nowhere except in the petitioners' brief can we find this doctrine of nunc pro tunc duress or hindsight compulsion.

In the allegations of duress and compulsion in the Amended Second Amended Petitions, no facts are averred—only legal hypotheses and conclusions. Nowhere do the appellants allege any instance of threats

or pressure against them by the enforcement officials. Consequently there is no factual or legal duress or compulsion presented at any point in these appeals.

The petitioners rely strongly upon language in the Opinion of the Pennsylvania Supreme Court in the instant case that where taxes or other monies are paid under duress or compulsion, no statutory authority is required to enable the payors to recover the amounts paid. However, this is dictum, and was not necessary to the decision of this case, since the Court had held that the license fees were not paid under duress and compulsion. Further, if the petitioners intend to rely upon this dictum, they must also include the further statement of the Court that even when taxes are paid under duress and compulsion, the taxpayer "could not have recovered them beyond six years after payment". This sustains the validity of a limitation upon the period for which the payor may recover under any circumstances.

The *Box Office Pictures* decision clearly held that the 5-year limitation was a basic condition to the power and authority of the Board of Finance and Revenue to grant refunds. That decision has not been overruled or modified. Assuming arguendo that the petitioners would have some sort of unspecified remedy for the recovery of license fees paid within six years prior to the institution of the suit, such a remedy would not be available before the Board of Finance and Revenue for license fees paid beyond the 5-year period.

ARGUMENT

I. Payments of Petitioners' License Fees Were Not Made Under Duress or Compulsion

The Supreme Court of Pennsylvania has ruled that the petitioners did not pay the license fees in question under legal duress, and discussed in support of this ruling the decisions of this Court in *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1921), and *Chesebrough v. United States*, 192 U.S. 253, 259 (1904). The former case dealt with the absence of a remedy, and the latter case with the necessity of a protest.

The Supreme Court of Pennsylvania further held that there was no violation of due process, because the petitioners "could have paid the fees under protest and with notice of an intent to reclaim and recover the amounts paid, and brought a timely suit in assumpsit or under certain circumstances a bill in equity to restrain the collection of the tax", and then enumerated other remedies available to the petitioners. The Court pointed out that "the fees in question were paid without protest as a quid pro quo for the inspection services rendered by the censorship board", quoting from its prior decision in *Box Office Pictures, Inc. v. Board of Finance and Revenue*, supra (402 Pa. 511, 518, 519, 166 A. 2d 656).

(a) Petitioners Made No Protests When the License Fees Were Paid

There could have been no duress or compulsion exerted against petitioners when the license fees were paid, because during the entire 39-year period, the petitioners made no protests as to payments and took none of the available procedural steps or remedies to have their rights adjudicated.

At common law, protest at the time of payment was a condition precedent to the recovery back of a tax which had been illegally exacted: *George Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 375 (1933).

Persons failing to avail themselves for an opportunity to object and be heard, cannot thereafter complain of assessments as arbitrary and unconstitutional: *Farncomb v. Denver*, 252 U.S. 7 (1920); see also *Pullman Co. v. Knott*, 235 U.S. 23 (1914).

Payment under protest was an essential ingredient for the payments under duress in the decisions of this Court cited on page 9 of the Petition for Certiorari.

In *Union Pacific RR Co. v. Public Service Commission*, 248 U.S. 67 (1918), cited four times by the petitioners and relied upon heavily by them, the protest against the payment was immediate and unequivocal. The Union Pacific Railroad left no doubt that the payment was being made under protest, and instituted the necessary proceedings to have the validity of the assessment litigated. This protest was basic to the railroad's position, and enabled this Court to rule that the payment of the assessment was not

voluntary, and therefore could subsequently be recovered from the Public Service Commission.

The payments have also been made under protest in *Atchison, T. & S. F. Ruy. Co. v. O'Connor*, 223 U.S. 280 (1912); *Gaar, Scott & Co. v. Shannon*, supra (223 U.S. 468) and *Robertson v. Frank Bros. Co.*, 132 U.S. 17 (1889), cited by petitioners.

In *Stahmann v. Vidal*, 305 U.S. 61, 64 (1938), also cited by petitioners, this Court expressly stated that under the statute there involved it was "unnecessary to plead or prove that the tax was paid under protest or its collection was accompanied by duress".

There are many cases which recognize that the payment of a tax or license fee, without protest, to prevent the closing of, or interference with, a business was a voluntary payment; see *Mays v. Cincinnati*, 1 Ohio St. 268 (1853); *Charlottesville v. Marks' Shows, Inc.*, 179 Va. 321, 18 S.E. 2d 890 (1942); *Houston v. Feizer*, 76 Tex. 365, 13 S.W. 266 (1890); and *United States v. New York C. Mail S.S. Co.*, 200 U.S. 488, 494 (1906), where this Court did not permit the recovery of amounts paid for stamps allegedly purchased under duress.

In *Swift Co. v. United States*, 111 U.S. 22 (1884), also cited by petitioners, the Government was seeking to defeat the recovery for revenue stamps on the basis that the payments made in conformity with the Governmental requirement precluded their recovery; but this Court limited such recovery to payments made within the six-year statute of limitations. That case amply demonstrated that the voluntary or involuntary

nature of the payments does not affect the applicability of a statute of limitations.

(b) Petitioners Did Not Seek Available Remedies

The petitioners had the right to an appeal from the decision of the Board of Censors to the Court of Common Pleas of the proper county under Section 26 of the Act of May 15, 1915, P.L. 53, 4 P.S. §54. This was the very procedure used in determining that the Act of 1915 was unconstitutional in *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (1956).

At the same time, the petitioners had the right within two years of payment to file petitions for refund under Section 503 of The Fiscal Code, 72 P.S. §503. There was no prerequisite for any litigation, past, present or future, as a basis for such petitions. Although the action of the Board of Finance and Revenue on such petitions would have been "final" under the statute, nevertheless, the petitioners could have secured review on narrow certiorari by the Supreme Court of Pennsylvania, as was done in the instant case.

The petitioners would also have the right to appeal from any summary proceedings instituted against them under the Act of 1915 if the magistrate would have assessed the fine of $25.00 to $50.00 imposable under the Act.

If we assume that the petitioners did not have adequate remedies under these statutes, they would have been entitled to relief in equity. This was the method

used to determine the constitutionality of the Act of 1911 (the predecessor of the Act of 1915) in *Buffalo Branch, Mutual Film Corp. v. Breitinger*, 250 Pa. 225, 95 Atl. 433 (1915).

The petitioners as domiciliaries of other states may have also had the power in the Federal Courts to restrain the enforcement of the Censorship Law by the State Board; see *Mutual Film Co. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), aff'g. 215 Fed. 138.

Consequently, petitioners cannot successfully contend that the license fees were paid under duress or compulsion, when they failed to take timely advantage of the adequate remedies at law or in equity available to them.

(c) Petitioners Are Estopped by Laches

The inaction of the petitioners constituted a waiver of their constitutional rights, and estopped them from successfully prosecuting the present cases. In *Wilson v. School District of Philadelphia*, 328 Pa. 224, 195 Atl. 90 (1937), the Court applied as to delinquent taxpayers "the equitable doctrine of estoppel * * * in the realm of constitutional law", and stated:

> "* * * Once a taxpayer has omitted to voice his objection within a reasonable time after the levy has been made and with knowledge that his claim will be made the basis of expenditures to be incurred, and the expenditures have been made, it is too late for him to attempt to impeach the validity of the tax levy. Under such circum-

> stances *he must be deemed to have waived all right to assert any constitutional objection which might have afforded him protection had he chosen to invoke it at the proper time.* * * *"*

In *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (May 26, 1952), this Court reexamined the validity of motion picture censorship statutes, and found them to be unconstitutional. The petitioners took no steps at that time to protect any rights which may have accrued. The Supreme Court of Pennsylvania, on the authority of the decision of this Court in the *Burstyn* case, held that the Pennsylvania Motion Picture Censorship Act was unconstitutional in *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (March 13, 1956). Again petitioners did not take any steps to obtain any refunds which might have accrued at that time.

The chronological sequence of facts is set forth in the Appendix to each of the Motions to Quash filed in the court below. As an example, this brief (p. 24) includes a copy of the Appendix of the Motion to Quash in the *Universal Film Exchanges, Inc.*, appeal, the first of the eight cases to be docketed. The appendices in all other cases are identical, except for normal variations in dates and amounts.

In the *Universal Film Exchanges* case, the initial Petition for Refund (2a) was filed with the Board of Finance and Revenue October 8, 1958, more than two and one-half years after the decision in the *Hallmark* case. That petition did not specify the amount of refund claimed, or the period of time involved. Two months later (December 5, 1958), the first Amended

Petition for Refund (5a) was filed, wherein a time period (October 8, 1953 to March, 1956) and a sum certain ($49,108.91) were specified. Two months later (February 6, 1959) an Amended Schedule (7a) to the First Amended Petition was filed, increasing the amount of the claim ($49,844).

On July 2, 1959, the Board of Finance and Revenue granted a refund to Universal Film Exchanges, Inc. (10a), in the amount claimed in Amended Schedule (i.e., $49,844). Three months later (October 8, 1959), the Second Amended Petition (11a) was filed, making a claim for refund for the period of May 15, 1915 to October 7, 1953 in the amount of $723,849.50 "and upwards". Fifteen months later (January 4, 1961), the Court decided the similar case of *Box Office Pictures v. Board of Finance and Revenue*, supra (402 Pa. 511, 166 A. 2d 656), wherein the question of duress and compulsion in the payment of motion picture censor license fees was discussed. Four and one-half months thereafter (May 25, 1961), the Amended Second Amended Petition (16a), was filed, in which the petitioners averred *for the first time* that the license fees were paid "under duress and compulsion". This was nine years after this Court decided the *Burstyn* case.

All of the present petitioners participated in the *Box Office Pictures* case as amicus curiae and were represented by counsel, who presented oral argument and briefs at both the original argument and reargument in the Supreme Court of Pennsylvania. The same counsel presented oral argument and briefs before that court in the present case.

These omissions and delays do not describe the reaction of parties who have been coerced into paying

unconstitutional fees. Duress would occur, if at all, when the payments were made and not as an afterthought conceived as many as 46 years later. Year after year, the Commonwealth was paying out to the employees of the Board of Censors the receipts from the license fees which the petitioners now seek to recover. This is sufficient change in position to justify the averment of laches, and demonstrates petitioners' delay in inventing their concept of duress—the hindsight variety.

Moreover, petitioners' petitions were defective for failing to plead facts, as distinguished from hypotheses and conclusions, relating to specific times and dates, places and amounts. Even the total amounts claimed were qualified by the words "and upwards". These pleadings were so vague and indefinite that neither the Board nor the Court, even if convinced that the license fees were refundable as having been paid under duress, could have made an order granting such refunds in any precise amount.

(d) The Censorship Statute Was Constitutional When the License Fees Were Paid

For the purpose of determining whether the censorship license fees were paid under duress and compulsion, the Act of 1915 imposing such fees must be deemed to have been constitutional between 1915 and 1953, the period when petitioners paid the license fees for which refunds are now being sought.

The constitutionality of motion picture censorship was upheld in *Buffalo Branch, Mutual Film Corp. v.*

Breitinger, supra (250 Pa. 225, 95 A. 2d 433), based on principles previously enunciated in *Mutual Film Corp. v. Industrial Commission*, supra (236 U.S. 230) by this Court. The constitutionality of censorship was never questioned in the Pennsylvania appellate courts until the *Hallmark* decision in 1956. See statement on this point in the *Box Office Pictures* case, supra (402 Pa. 511, 517, 518, 166 A. 2d 656, 660).

This means that the motion picture censorship act was constitutional between 1915 and 1956, not because of the presumption of constitutionality, but because of a positive ruling to that effect by the appellate courts. Under these circumstances, the rule of retroactive unconstitutionality should not apply, because it would be impossible to determine at what point of time the constitutional statute became unconstitutional.

It is well established that in the rare instances where courts depart from the doctrine of stare decisis and overrule previous decisions affecting rules of property and vested rights, such change of position is limited prospectively: *Douglas v. County of Pike*, 101 U.S. 677 (1879); *Taylor v. Ypsilanti*, 105 U.S. 60, 71 (1881); *Olcott v. Supervisors of Fond Du Lac Co.*, 16 Wall 678, 21 L. Ed 382 (1873); *Duhame v. State Tax Commission*, 55 Ariz. 268, 179 P. 2d 252 (1947); *Button v. Drake*, 302 Ky. 517, 195 S.W. 2d 66 (1946); 14 *Am. Jur.* 346, "Courts", §130.

Under this doctrine, the inspections by the motion picture censors and the licenses paid thereunder were completed under the Act of 1915 at a time when it was constitutional.

Even if this doctrine of prospective modification of stare decisis were not applicable to the present case, the doctrine of retroactive unconstitutionality should not apply to transactions consummated prior to the decision holding the statute invalid.

In *Chicot Co. Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940), after expressly distinguishing the cases relied upon by petitioners (*Norton v. Shelby Co.*, 118 U.S. 425, 442; *Chicago, I. & L. Ry. Co. v. Hackett*, 228 U.S. 559, 566), this Court stated:

> "* * * The actual existence of a statute, prior to such a determination, [i.e., unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

This was quoted with approval by the Supreme Court of Pennsylvania in the *Box Office Pictures* case, supra.

Petitioners excuse their failure to make any protest or to take advantage of the various remedies available on the grounds that "it would not have been possible to obtain a court decision holding the 1915 Censorship Act unconstitutional until, at the very earliest, sometime after 1952" when the *Burstyn* case was decided by this Court; and that any action brought during this period would have been "futile" and "summarily dismissed" (Petition for Certiorari, p. 12). This sense of futility was apparently not shared by the parties who successfully prosecuted the litigation before this Court in the *Burstyn* case and before the Pennsylvania Supreme Court in the *Hallmark* case.

The petitioners' logic can result in only one conclusion—that the "duress or compulsion" averred for the period from 1915 to 1953 arose out the 1915 decisions of this Court and of the Supreme Court of Pennsylvania upholding the constitutionality of censorship of motion pictures. In other words, petitioners are saying that they paid the license fees under "duress", because they believed that the law, as interpreted by our highest Courts, constitutionally required them to do so; this is why they did not seek any of the available remedies. Petitioners have thus added another ingredient to the availability of a remedy, i.e., an absolute guarantee that they would have prevailed. Such a doctrine of duress cannot be supported either by precedent, logic, or common sense.

In the absence of protest or resort to judicial review, the payments of taxes or license fees in the belief that the law imposing them was valid, whereas it was afterwards declared unconstitutional, were pay-

ments made under a mistake of law and therefore not recoverable: 51 *Am. Jur.* 1024, 1025, "Taxation", §1193. This has been the law of Pennsylvania: *Royal McBee Corp. Tax Case*, 393 Pa. 477, 480, 143 A. 2d 393 (1958); *Philadelphia & Reading C. & I. Co. v. Tamaqua Borough School District*, 304 Pa. 489, 494, 156 Atl. 75 (1931); *Taylor v. Board of Health*, 31 Pa. 73, 75 (1855); *Box Office Pictures, Inc. v. Board of Finance and Revenue*, supra (402 Pa. 511, 518, 166 A. 2d 656, 659); *H. J. Heinz Co. v. School District of Pittsburgh*, 170 Pa. Superior Ct. 441, 445, 87 A. 2d 85 (1952); *Schoenfeld v. City of Bradford*, 16 Pa. Superior Ct. 165, 170 (1901).

II. The Five-Year Statutory Limitation Was Valid and the Board of Finance and Revenue Had No Jurisdiction To Grant These Refunds

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The Board of Finance and Revenue had no jurisdiction to grant refunds for license fees paid more than five years prior to the dates of filing the respective petitions for refund. Article I, Section 11 of the Constitution of Pennsylvania places in the Legislature the plenary power to provide under what conditions money previously paid may be refunded. Ordinarily, refunds may be claimed only for licenses or taxes paid within two years of the date of the petition; but where the statute imposing such license or tax has been judicially declared to be unconstitutional, the Legislature has enlarged the time limit to five years. These respective time limits are conditions precedent to relief, and are an inextricable part of the basic jurisdic-

tion of the Board. Since the Board's refund jurisdiction exists only as to licenses or taxes paid within those time limits, there could not have been any basis for granting any relief to the petitioners.

In discussing these time limitations, the Supreme Court of Pennsylvania said, in *Box Office Pictures, Inc. v. Board of Finance and Revenue*, supra (402 Pa. 511, 516, 166 A. 2d 656):

> "'* * * These requirements were not merely procedural provisions, but express conditions of the right to obtain a refund, failure to comply with which operated as an absolute bar to the right itself.'"

If it be assumed that the arguments presented in the previous subdivision of this brief were invalid, e.g., that the fees were not paid under duress or compulsion, or that the Act of 1915 was not void from the beginning, the period of limitations established by the Pennsylvania Legislature would still be effective and appropriate. This was also discussed by the Supreme Court of Pennsylvania in the *Box Office Pictures, Inc.*, case, supra, when it said:

> "* * * Assuming, arguendo, (1) that the Act of 1915 was void ab initio; (2) that the fees in question were paid under duress and compulsion; (3) that under common law, the Commonwealth could be sued for recovery; still, the legislature had the power and authority to prescribe the remedy to be pursued and to annex thereto reasonable conditions incident to the exercise of the right to sue: * * *"

The Court in the present case did not alter or overrule its decision in the *Box Office Pictures* case.

Petitioners rely upon the statement made by the Court in the instant case that no statutory authority is necessary to enable the recovery of amounts paid under duress and compulsion. However, the Court in the instant case also pointed out that when taxes were paid under duress and compulsion, the taxpayer could not recover them beyond six years after payment, citing *Swift Company v. United States*, supra (111 U.S. 22). Therefore, under even a common law form of action against the sovereign, a six-year period of limitations would apply, thus upholding the constitutionality of limitations in general.

This position is confirmed by a study of *Ward v. Love County*, 253 U.S. 17 (1920), cited in the Court in the instant case, and relied upon by petitioners. There a county in Oklahoma had collected taxes on allotments belonging to Indians in violation of exemptions protected by The Choctaw Treaty; the Act of Congress enabling Oklahoma to become a state; the Constitution of Oklahoma; and the Constitution of the United States; see Article II, Section 2, clause 2. There was undeniable duress, accompanied by protests, and this Court decided that the county must refund the taxes thus obtained.

Regarding the attempt of the county to rely upon the local statute of limitations, this Court said:

> "• • • This point was not discussed by the Supreme Court [of Oklahoma] and we are not concerned with it beyond observing that when the case is remanded it will be open to that court to

> deal with the point as to the whole claim or any item in it as any valid local law in force when the claim was filed may require." (253 U.S. 25).

After that decision, this Court denied certiorari in *Broadwell v. Bryan Co.*, 88 Okla. 147, 211 P. 1040 (1922), cert. den. 262 U.S. 750, where a two-year Oklahoma statute of limitations on filing a petition for refund of taxes paid by Indians from lands not subject to taxation was held to defeat a suit filed by an Indian beyond the two-year limitation. The plaintiff contended that since the state courts had held that he was not entitled to relief, his right of action did not accrue until this Court reversed the Oklahoma Court in *Choate v. Trapp*, 224 U.S. 665 (1912), followed by this Court in *Ward v. Love County*, supra (253 U.S. 17). Nevertheless, the court held that this cause of action accrued on the date the money was paid to the county in each instance, and concluded (211 P. 1042):

> "* * * We know of no rule, and no authority is cited to support the rule, that the statute of limitations does not run against a claim until a court of final resort has had adjudged a similar action could be successfully maintained."

See also *American Steel & Wire Co. of New Jersey v. State of Washington*, 49 Wash. 419, 302 P. 2d 207 (1956), which sustained a one-year limitation refund statute and distinguished *Ward v. Love County*, supra, and *Carpenter v. Shaw*, 280 U.S. 363 (1930), also relied upon by petitioners.

Under the Pennsylvania statutes and decisions, the Board of Finance and Revenue has no power to hear any case for refunds of payments made more than

five years prior to the filing of the petition. Therefore, any type of action available to petitioners, whether statutory or non-statutory, could not be heard by the Board, and its refusal to grant refunds beyond the five-year period should be affirmed.

III. Jurisdiction of This Court on Certiorari

The Pennsylvania Legislature, in permitting the Board of Finance and Revenue to grant refunds, provided that the action by the Board shall be "final". This means that there can be no appeal or writ of error from the decision of the Board, but only a review on narrow certiorari by the Supreme Court of Pennsylvania. Ordinarily, this review is limited to jurisdiction and regularity of proceedings, but the present case also includes a constitutional question, i.e., whether the five-year limitation was constitutional.

It is suggested that the certiorari available in this Court should likewise be limited to the question of constitutionality of the five-year limitation, and not embrace the many other facets of the case presented by the petitioners.

Otherwise, the petitioners will be achieving indirectly what they cannot do directly, i.e., bring a suit against the sovereign Commonwealth of Pennsylvania in this Court; see Article III, Section 2, and Eleventh Amendment, United States Constitution.

It has long been well settled that the sovereign immunity of a state prevented a suit to recover money in the general treasury and that a state could confine

to its own Courts suits against it to recover taxes: *Smith v. Reeves*, 176 U.S. 436 (1900); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945).

At one time suits were permitted against a revenue officer to recover tax moneys illegally collected and still in his possession; see *Atchison, T. & S. F. Rwy. Co. v. O'Connor*, supra (223 U.S. 280), relied upon by the present petitioners. However, such a suit could not be maintained unless the State expressly consented to suits against it in the Federal Court; *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944). Subsequent decisions indicate that the rule which once permitted such suits to recover taxes from a segregated fund has been distinguished away; *Ford Motor Co. v. Department of Treasury of Indiana*, supra, (323 U.S. 459); *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573 (1946).

Accordingly, this Court should refuse the petition for certiorari in the present case, because the only justiciable issue is the constitutionality of a patently valid five-year period of limitations contained in the Pennsylvania refund statute.

Respectfully submitted,

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APPENDIX TO MOTION TO QUASH

Chronological Sequence of Petitions and Orders

UNIVERSAL FILM EXCHANGES, INC.

March 13, 1956, Decision in Hallmark Productions, Inc. v. Carroll, 384 Pa. 348 (1956).

October 8, 1958, Petition for Refund filed with Board of Finance and Revenue, Docket No. M-14534. No period or specific amount requested.

December 5, 1958, First Amended Petition for Refund filed with Board of Finance and Revenue. Petition incorporates paragraphs 1, 2, 3 and 4 of Petition for Refund and sets forth a certain time period (October 8, 1953 to March, 1956) and a sum certain ($49,108.91).

February 6, 1959, Amended Schedule "A" to First Amended Petition filed. This increased amount claimed to $49,844.00.

July 2, 1959, Board of Finance and Revenue granted refund in nature of a credit in amount of $49,844.00. Copy mailed July 8, 1959."

October 8, 1959, Second Amended Petition filed. Docket No. M-16585. Petition incorporated paragraphs 1, 2, 3 and 4 of original Petition for Refund. Requested refund for period May 15, 1915 to October 7, 1953 in amount of "$723,849.50 and upwards".

January 4, 1961, Decision in Box Office Pictures v. Board of Finance and Revenue, 402 Pa. 511 (1961).

May 25, 1961, Amended Second Amended Petition filed. Avers fees were paid "under duress and compulsion" and a denial of due process.

October 3, 1961, Order of Board of Finance and Revenue refusing the Petition. Copy mailed October 9, 1961.

October 24, 1961, Appeal taken to the Supreme Court.